U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 09 January 2003

CASE NUMBER: 1999-LHC-3114 and 2002-LHC-1612

OWCP NO.: 07-135507 and 07-134070

IN THE MATTER OF

PAUL H. BROOKS,
Claimant

v.

TRINITY INDUSTRIES, INC.,
Employer

and

RELIANCE NATIONAL INDEMNITY CO.,
Carrier

APPEARANCES:

Milton J. Osborne, Jr., Esq.
On behalf of Claimant

Collins C. Rossi, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et. seq.*, brought by Paul H. Brooks (Claimant) against Trinity Industries, Inc., (Employer), and Reliance National Indemnity Co. (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. Claimant filed two claims for compensation under the Act, which were

consolidated for hearing. The hearing on both claims was held on July 26, 2002, and August 27, 2002, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified but did not introduce any exhibits.[1] Employer introduced twenty exhibits, which were admitted, including: Department of Labor filings; correspondence from Claimant to OWCP; Claimant's wage records; the medical records of Drs. Paul Naccari, Terry Habig, David Shurden, and John McLachlan; the depositions of Drs. John McLachlan and David Shurden; and vocational reports from Riggles & Associates. The medical depositions of Drs. Ira P. Markowitz and J. Gregory Kinnett were submitted as Administrative Law Judge Exhibits.

No post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

Case No. 7-134070

1. The date of injury was July 1, 1993, and the injury occurred in the course and scope of employment, during the existence of an employer-employee relationship;

2. Employer was notified of the injury on July 1, 1993;

3. A notice of controversion was filed on September 18, 1995;

4. An informal conference was held on September 6, 1995;

5. Employer paid medical benefits pursuant to Section 7 of the Act;

6. Claimant's average weekly wage at the time of the accident was $525.00;

7. Employer paid temporary total disability benefits from February 14, 1995, to March 6, 1995, totaling $1,050.00.

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[1] References to the transcript and exhibits are as follows: Trial transcript- Tr.__; Claimant's exhibits- CX-__, p.__; Employer's exhibits- EX-__, p.__; Administrative Law Judge exhibits- ALJX-__; p.___.

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1. The date of injury was July 26, 1994, and the injury occurred in the course and scope of employment, during an employer-employee relationship;

2. Employer was notified of a hand injury on July 26, 1994;

3. Employer filed a notices of controversion on September 18, 1995, and on November 15, 1995;

4. An informal conference was held on September 6, 1995;

5. Employer paid medical benefits pursuant to Section 7 of the Act;

6. Employer paid temporary total disability benefits from July 27, 1994, to March 15, 1995, totaling $12,982.41;

7. Employer paid a scheduled permanent partial disability of $8,759.78.

II. ISSUES

The following unresolved issues were presented by the parties:

Case No. 7-134070

1. Nature and extent of disability;

2. Residual wage earning capacity;

3. Maximum medical improvement;

4. Interest and attorney's fees.

Case No. 7135507

1. Notice of injury;

2. Causation as related to a shoulder injury;

3. Nature and extent of disability;

4. Maximum medical improvement;

5. Residual wage earning capacity,

6. Interest and attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology

Claimant, born in July 1937, testified that he completed two years of college at Jackson State University in Mississippi, from 1957-1959. (Tr. 18-19). Claimant began working for Employer around 1978-79, as a helper fitter and tacker. (Tr. 20). Around 1980, Employer promoted Claimant to a fitter's position, which he maintained until 1995. (Tr. 20-21).

Claimant testified that he injured his knee on July 1, 1993. (Tr. 22). After crawling on his knees and performing tacking and fitting work on a vessel for much of the day, Claimant attempted to egress from the vessel, but he saw that other workers had blocked access to the gangway. (Tr. 22). Unwilling to wait, Claimant decided to make a short three to four foot jump from the vessel onto a different gangway next to some scaffolding. (Tr. 22). When Claimant landed, he felt his knee go limp. (Tr. 22). Nonetheless, Claimant continued to work following his injury. (Tr. 25).

On February 5, 1994, Claimant presented to Dr. Naccari complaining that he suffered longstanding knee pain which he related to his July 1993 workplace accident. (EX 13, p. 8). Although not relating any other previous history of knee pain to Dr. Naccari, Claimant's family physician, Dr. Shurden, related that Claimant complained of knee pain as early as 1982. (EX 16, p. 8). On February 11, 1994, Dr. Naccari restricted Claimant's work activities to light duty with no lifting over twenty pounds, no squatting, climbing, heights, and no kneeling. (EX 13, p. 6). An x-ray taken on February 22, 1994, revealed that Claimant's left knee had marked osteoarthritic changes involving the medial compartment, bone on bone articulation, large osteophytes with calcification of the medial collateral ligament, breaking of the tibia spine, a varus confirmation of the joint, posterior joint mice, an increase in relative sclerosis of the femur and tibia condylar surfaces, osteophytes at the patella and distal femur, advanced degenerative changes, and a small soft tissue opacification at the proximal tibiofibular interosseous region. *Id*. at 4.

On March 21, 1994, on the referral from Dr. Shurden, Claimant began treatment with Dr. Kinnett, an orthopaedic surgeon, for treatment of his knee pain and Claimant ceased treating with Dr.

Naccari. (ALJX 2, p. 5). Dr. Kinnett continued Claimant's light duty work restrictions recommending that Claimant not engage in any repetitive bending, stooping, squatting, or bending, and opining that Claimant should not lift in excess of thirty pounds or climb stairs other than on a limited basis. *Id*. at 12-13. Claimant continued to work for Employer. (Tr. 25).

On July 27, 1994, Claimant suffered a second work place accident to his left hand. (Tr. 25). The injury occurred when Claimant was working on a gangway capping a sixty foot long, one-half inch thick, piece of metal. (Tr. 26). A welder put a pad-eye on the piece of metal so the crane could lift it up, and while Claimant was holding one end, the pad-eye broke, and the metal's jagged edge lacerated Claimant's hand. (Tr. 26-27). Immediately following the injury, Claimant saw Dr. McLachlan, an orthopaedic surgeon, in the hospital and he became Claimant's treating physician for that injury. (Tr. 25; EX 17, p. 11).

Dr. McLachlan noted that Claimant suffered a two to three centimeter laceration across the palmar surface of his hand that was approximately one centimeter deep. (EX 17, p. 11). Dr. McLachlan performed surgery consisting of debridement, cleansing, repair of the flexor sublimis and profundus tendons, and repair of the pulley and synovial sheath. *Id*. at 15. By August 9, 1994, Dr. McLachlan opined that Claimant could resume sedentary work based on his hand injury. *Id*. at 59. Dr. McLachlan also opined that Claimant could return to light duty work on September 9, 1994, and by October 4, 1994, Claimant was ready for light to medium level work with specific instructions regarding his hand. *Id*. at 56-57. Claimant had an excellent result from his hand surgery, and on January 9, 1995, Dr. McLachlan recommended Claimant return to his former employment even though he did not assign a date of maximum medical improvement until May 15, 1995 with a fifty percent permanent impairment to his index finger. *Id*. at 1, 4, 46, 70. On July 24, 1995, Dr. McLachlan discharged Claimant from his care. *Id*. at 46; (EX 18, p. 16).

Meanwhile, Claimant knee condition had progressed to a point where Dr. Kinnett recommended arthroscopic surgery, which was performed on September 27, 1994. (ALJX 2, p. 24-25). During the procedure, Dr. Kinnett found free edge degenerative tears of the lateral meniscus, osteoarthritis, synovitis, traumatic articular cartilage flap, medial condyle and traumatic disruption of the posterior third of the medial meniscus. *Id*. at 25. During arthroscopy, Dr. Kinnett corrected traumatic disruptions of the posterior third of the medial meniscus, the articular cartilage flap, and corrected degenerative tears in the lateral meniscus. *Id*. Initially, Claimant healed well, but around mid-October 1994, Clamant telephoned complaining of knee swelling, and on October 24, 1994, Dr. Kinnett noticed gross swelling in Claimant's left lower extremity. *Id*. at 28-30. Dr. Kinnett determined that Claimant had thrombophlebitis, which was directly related to undergoing orthopaedic surgery. *Id*. at 30, 33. Dr. Kinnett placed Claimant on anti-inflammatory medication, administered and monitored by Dr. Shurden, and he remarked that the development of thrombophlebitis significantly delayed Claimant's recovery from surgery. *Id*.

On February 22, 1995, Dr. Kinnett released Claimant to return to light duty work, meaning that Claimant could not engage in repetitive stooping, squatting, or bending, no standing in one position longer than one hour, and no heavy lifting in excess of thirty pounds. (ALJX 2, p. 35-36). On March 1, 1995, Claimant was still having trouble with his thrombophlebitis, and Dr. Kinnett added

work restrictions such that Claimant was not to carry any significant amount of weight due his insecurity, pain, and limited range of motion in his left knee. *Id*. at 37.

Pursuant to his work restrictions, Claimant returned back to work for Employer on March 6, 1995, performing a light duty position taking inventory. (Tr. 29). Claimant testified that he was physically able to perform the work, but he was terminated after three days for failure to take a drug test. (Tr. 30, 32, 52, 56).

On May 1, 1995, Claimant also complained for the first time to Dr. Kinnett about low back pain. (ALJX 2, p. 41-42). Dr. Kinnett opined that Claimant's back pain was due to his altered gait pattern which may have been caused by a bad hip, knee, foot, leg length disparity, or some other factor. *Id*. at 44. By July 3, 1995, Dr. Kinnett noted that an earlier pitting edema was almost completely resolved, and Dr. Kinnett declined to make any changes in Claimant's work restrictions. *Id*. at 46-47. In September 1995, Dr. Kinnett referred Claimant back to Dr. Shurden for continued care. *Id*. at 47-48.

On September 18, 1995, Claimant returned to Dr. Kinnett referencing pain in his shoulder for the first time. (ALJX 2, p. 48). Claimant related that the injury was due to his July 26, 1994 workplace accident. Claimant's physical exam demonstrated limitation of motion in his left shoulder, subacromial crepitus with shoulder motion, tenderness to palpation, weakness in abduction, and a rupture of the distal insertion of the biceps. *Id*. at 50-51. X-rays revealed a marked loss of subcrominal space with degenerative changes that were at least two or three months old. *Id*. at 53-54. Dr. Kinnett's impression was a rotator cuff tear with impingement syndrome. *Id*. at 54.

A subsequent MRI demonstrated a massive tear of the rotator cuff with retraction but no evidence of ruptured distal biceps. (ALJX 2, p. 56-57). After Claimant's September 18, 1995 examination, Dr. Kinnett stated that Claimant should not work at all with his left upper extremity and he could only use it for the activities of daily living. *Id*. at 57. Claimant was a candidate for arthrotomy surgery, whereby Dr. Kinnett would open the shoulder, find the retracted cuff tear, debride it, immobilize it, and suture back to its anatomic insertion. *Id*. at 58. Dr. Kinnett also recommended a acromioplasty, performed during the arthrotomy, to create more room between the roof of the shoulder and the shoulder so as not to interfere with the healing of the rotator cuff. *Id*. at 58-59. Convalescence from such surgery lasted four to six months. *Id*. at 62-63. If surgery was successful, Dr. Kinnett opined that claimant could return to his normal activities. *Id*. at 63.

In November 1995, Dr. Kinnett treated Claimant for his knee, but did not note any significant changes. (ALJX 2, p. 59). Likewise, a January 9, 1996 evaluation of Claimant's knee did not reveal any change, and on July 15, 1996, Claimant merely continued to complain about pain in his knee and shoulder. *Id*. at 60-61. Claimant's treatment options for his knee was either to do nothing surgically, or have a surface replacement arthroplasty, knee fusion, and debridements. *Id*. at 63. Assuming that

claimant elected not to have the surgery, then he has reached maximum medical improvement as documented in his reports.[2] *Id*. at 64-65.

Claimant's problems with phlebitis continued, and Dr. Kinnett referred Claimant to Dr. Markowitz, an expert in the field of vascular surgery, who began treating Claimant on September 20, 1996. (ALJX 1, p. 4-6). Dr. Markowitz opined that Claimant's development of phlebitis was directly related to his arthoscopic surgery. *Id*. at 16. In addition to thrombophlebitis, which was caused by stasis, hypercoagulability, or damage due to trauma, Claimant also had arterial sclerosis, due to cholesterol, lack of exercise, diabetes, hypertension, or smoking, which created blood clots in Claimant's limbs. *Id*. at 20-27. Dr. Markowitz also traced Claimant's blood flow problems to macroglobulinemia, a hereditary blood disorder that caused blood in the hands and toes to become blocked. *Id*. at 30. Due to his hereditary disease, Claimant eventually lost fingers and toes. *Id*. at 31-32. Simultaneously, Claimant experienced an exacerbation of thrombophlebitis on July 27, 1998, but Dr. Markowitz related that the exacerbation would completely resolve by December 18, 1998. *Id*. at 32-33, 37.

B. Claimant's Testimony

As a result of Claimant's eventual knee surgery with intervening thrombophlebitis, and the immediate surgery required for Claimant's hand, Claimant testified that he missed work from July 27, 1994, to March 1995. (Tr. 29). When Claimant returned to light duty work in March 1995, he testified that he was not doing much because he could hardly walk. (Tr. 29). Claimant's light duty position consisted of taking inventory on stock located in the yard, it paid $11.25 an hour, and he testified that he thought he was physically capable of performing such a sedentary type job. (Tr. 32, 52, 56). After three days, Employer wanted to give Claimant a different job position that paid less money. (Tr. 29). Claimant refused to take a lower paying job, and Employer asked Claimant to sign some paperwork to have a drug test. (Tr. 29). Claimant testified that he requested to take the authorization home to read it before signing, but Employer refused, and told Claimant that he had to either take the drug test or be terminated. (Tr. 29-30). Claimant had no knowledge of what the language on the form was, and as a result of his refusal to sign, Employer terminated his position. (Tr. 30).

Claimant related that he could work with his left hand after he recovered from his hand surgery, but he could not undertake any activity for more than fifteen minutes to a half-hour, and could not resume his former job as a fitter (Tr. 36-37). Currently, Claimant related that he is totally unable to work because he is hampered by both a knee and a back problem. (Tr. 46). Also, Claimant began to notice shoulder pains at the time of his hand surgery. (Tr. 63). Claimant acknowledged that when he sent a letter to the Department of Labor on February 27, 1995, after the date of his surgery, and he only mentioned damage to his hand hand as a result of the accident without mentioning any shoulder pain. (Tr. 63-64; EX 8, p. 1). In a 1997, Claimant had all but his two largest toes

[2] Dr. Kinnett's report detailing a date for maximum medical improvement was not submitted into evidence.

amputated. (Tr. 34). One hand was amputated in December 1997, and the other amputated in March 1998. (Tr. 34). With his fingers amputated, Claimant testified that he had difficulty handling such items as change. (Tr. 50). Claimant could handle dollar bills, but could not move fast because he had no feeling in the tips of his fingers. (Tr. 51). Also, Claimant testified that his legs swell every night, and his pain remained more or less constant over the past several years. (Tr. 58).

C. Exhibits

(1) Medical Records of Paul Naccari

On February 5, 1994, Claimant presented to Dr. Naccari complaining that he suffered from five months of left knee pain and Claimant denied having any prior history of such symptoms. (EX 13, p. 8). On February 11, 1994, Dr. Naccari restricted Claimant's work activities to light duty with no lifting over twenty pounds, no squatting, climbing, heights, and no kneeling. *Id*. at 6. On February 22, 1994, Claimant stated that he was not doing any better, and Dr. Naccari referred Claimant to Dr. Rodriguez for further evaluation of the knee and further diagnostic testing. *Id*. at 1. Dr. Naccari also reiterated his light duty work restrictions of no squatting, climbing, or crawling. *Id*. at 1, 3.

An x-ray taken on February 22, 1994, revealed that Claimant's left knee had marked osteoarthritic changes involving the medial compartment, bone on bone articulation, large osteophytes with calcification of the medial collateral ligament, breaking of the tibia spine, a varus confirmation of the joint, posterior joint mice, an increase in relative sclerosis of the femur and tibia condylar surfaces, osteophytes at the patella and distal femur, advanced degenerative changes, and a small soft tissue opacification at the proximal tibiofibular interosseous region. (EX 13, p. 4).

(2) Medical Records and Deposition Testimony of David Shurden

On May 14, 1996, Employer noticed Dr. Shurden's deposition. (EX 16, p. 1, 5). As Claimant's family physician specializing in internal medicine, Dr Shurden noted that Claimant had complained of bilateral knee pains as early as 1982. *Id*. at 8. In the winter of 1987-88, Clamant again complained of swelling in his left knee, but Dr. Shurden did not take any x-rays because Claimant did not have insurance, and his problems seemed to be related to arthritis. *Id*. at 9. In December 1990, Dr. Shurden ordered x-rays of Claimant's lumbar and cervical spine, in relation to complaints of low back and neck pain, but Dr. Shurden had no record of receiving those x-rays and he postulated that Claimant never had the money to pay for the tests. *Id*. at 11.

Claimant mentioned that he had injured his left leg and twisted his knee in a workplace injury on January 27, 1994, complaining that his knees felt as if they were "bone on bone." (EX 16, p. 15-16). Claimant also complained about impotence, but Dr. Shurden did not relate that condition to Claimant's knee pain because Claimant's impotence was a long standing problem. *Id*. at 18. After Claimant underwent surgery with Dr. Kinnett in October 1994, Dr. Shurden assisted Dr. Kinnett in treating Claimant's thrombophlebitis - a blood clot that inflamed the vein. *Id*. at 18-19, 21. The

problems was treated with rat poison, under the name Coumadin, which helped thin the blood and helped to dissolve the blood clot over a period of time. *Id*. at 20-21. Thrombophlebitis could either be caused by trauma, or by a hardening of the arteries, and Dr. Shurden thought Claimant's case was caused by his knee injury because Claimant had a lot of swelling as a result of his knee injury and that could cause stagnation of fluid. *Id*. at 39-41. Diabetes also caused the arteries to harden, and a person with high blood pressure would be more likely to develop thrombophlebitis. *Id*. at 43-44. After undergoing surgery, Dr. Shurden continued to treat Claimant for high blood pressure, and Dr. Shurden remarked that every time he treated Claimant, there was always some complaint about his knees. *Id*. at 23-24. On February 24, 1995, Dr. Shurden reported that Claimant could not return to work and the only activities he could perform safely were: moving his fingers, walking short distances, using his hands and arms, sitting, listening, and using his eyes. (EX 15, p. 1). As of the date of the deposition, on May 14, 1996, Dr. Shurden opined that Claimant's thrombophlebitis had resolved. (EX 16, p. 37-38).

Although Dr. Shurden did not specifically note the date, Claimant also complained to him about a hand injury and his subsequent hand surgery. (EX 16, p. 23-24). On May 12, 1995, Dr. Shurden reflected that Claimant still had pain and swelling in his knee, and on July 17, 1995, Dr. Shurden diagnosed Claimant with diabetes. *Id*. at 27-28, 31-32.

On January 12, 1996, Claimant presented to Dr. Shurden complaining of left upper extremity pain such that he could not raise his left shoulder, but Claimant followed up on that complaint with Dr. Kinnett. (EX 16, p. 34). Claimant also had presented to Dr. Shurden in December 1980 after falling and hurting his shoulder. *Id*. at 35. Claimant had initially sought treatment at St. Claude General Hospital, and Dr. Shurden remarked that Claimant's January 1996 shoulder pain may be a post-traumatic symptom. *Id*. at 35.

(3) Deposition of Dr. J. Gregory Kinnett

On August 16, 1996, Employer noticed the deposition of Dr. Kinnett, an orthopaedic surgeon. (ALJX 2, p. 1). Dr. Kinnett related that he first saw Claimant on March 21, 1994, on a referral from Claimant's family physician concerning severe pain in the left knee. *Id*. at 5. Although Claimant reported to Dr. Kinnett that he had no prior medical history related to his knee, when Dr. Kinnett subsequently learned that Claimant had six or eight year history of knee pain, he opined that such information would not change his conclusions, but with more information the history of knee pain may become significant. *Id*. at 7. On Dr. Kinnett's initial physical exam, Claimant had an antalgic gait, a varus alignment of the knee, a slight lateral thrust, and a diminished range of motion. *Id*. at 8-9.

X-rays of Claimant's knee revealed that Claimant had advanced tri-compartmental osteoarthritis with a complete loss of the medical joint space and varus alignment, and subchondral scelerosis. (ALJX 2, p. 10-11). Dr. Kinnett's impression was tri-compartmental osteoarthritis and post–traumatic synovitis of the left knee. *Id*. at 12. Due to his knee injury, Claimant should not

engage in repetitive stooping, squatting, or bending, he should not perform heavy lifting in excess of thirty pounds, and should limit any stair climbing. *Id*. at 12-13.

When Claimant returned on April 20, 1994, Claimant was still in pain and he was taking anti-inflammatory medication. (ALJX 2, p. 14). On August 8, 1994, Claimant presented to Dr. Kinnett after an intervening laceration to his hand. *Id*. at 21. Although Dr. Kinnett wanted to treat Claimant for the new injury, Carrier did not approve his treatment, and sent Claimant to another physician. *Id*. at 22. After Claimant's knee did not show any significant improvement in September 1994, Dr. Kinnett discussed the option of diagnostic and "potentially therapeutic" arthroscopy, even though tri-compartmental osteoarthritis was not treated by that procedure. *Id*. at 24. Arthroscopy provided the opportunity to determine if there were any simple problems that could be corrected, and Claimant elected to have the surgery on his left knee on September 27, 1994. *Id*. at 24-25.

During the arthroscopic surgery, Dr. Kinnett found free edge degenerative tears of the lateral meniscus, osteoarthritis, synovitis, traumatic articular cartilage flap, medial condyle and traumatic disruption of the posterior third of the medial meniscus. (ALJX 2, p. 25). During arthroscopy, Dr. Kinnett corrected traumatic disruptions of the posterior third of the medial meniscus, the articular cartilage flap, and corrected degenerative tears in the lateral meniscus. *Id*. By shaving Claimant's tears, Dr. Kinnett hoped that he would stop Claimant's synovitis, or inflammation and swelling of his knee. *Id*. at 26-27. Claimant was unable to return to work until he had recovered from his arthroscopic surgery. *Id*. at 27. By October 10, 1994, Claimant had progressed to a point whereby Dr. Kinnett recommended that he resume ambulation. *Id*. at 28. Three days later, however, Clamant telephoned complaining of knee swelling and on October 24, 1994, Dr. Kinnett noticed gross swelling in Claimant's left lower extremity. *Id*. at 28-30. Dr. Kinnett determined that Claimant had thrombophlebitis, which was directly related to having orthopaedic surgery. *Id*. at 30, 33. Neither high blood pressure nor diabetes caused such a condition. *Id*. at 33. Dr. Kinnett placed Claimant on anti-inflammatory medication and remarked that the development of thrombophlebitis significantly delayed Claimant's recovery from surgery. *Id*.

Normally, Dr. Kinnett expected a patient to recovery from arthroscopic surgery after three to four weeks, but to his knowledge, Claimant had not recovered by the time of his deposition on August 16, 1996. (ALJX 2, p. 31). On November 16, 1994, after hospitalization for thrombophlebitis, Dr. Kinnett detected edema from Claimant's left knee and extending down. *Id*. at 31-32. Claimant was walking and moving around, but Dr. Kinnett did not release Claimant to return to work activity. *Id*. at 32. Claimant remained disabled for any work activity in December, and Dr. Kinnett continued those restriction through February 1995 because Claimant's venous circulation was not completely resolved and he had persistent swelling and edema. *Id*. at 34-35.

On February 22, 1995, Dr. Kinnett released Claimant to return to light duty work, meaning that Claimant could not engage in repetitive stooping, squatting, or bending, no standing in one position longer than one hour, and no heavy lifting in excess of thirty pounds. (ALJX 2, p. 35-36). On March 1, 1995, Claimant was still having trouble with his thrombophlebitis, and Dr. Kinnett added work restrictions such that Claimant was not to carry any significant amount of weight due his

insecurity, pain, and limited range of motion in his left knee. *Id*. at 37. On April 10, 1995, Dr. Kinnett noted that Claimant's had no left calf tenderness, and only minimal calf swelling. *Id*. at 38-39. Claimant's thrombophlebitis continued, but Claimant's symptoms continued to show improvement. *Id*. at 39.

On April 10, 1995, Dr. Kinnett also discussed the possibility of surface replacement arthroplasty after his thrombophlebitis had completely resolved. (ALJX 2, p. 39). On May 1, 1995, Claimant's edema in his left lower extremity showed signs of continued improvement, but he did have some mild tenderness in his calf, and his knee showed no signs of improvement. *Id*. at 41. Claimant also complained for the first time to Dr. Kinnett about low back pain. *Id*. at 41-42. Dr. Kinnett opined that Claimant's back pain was due to his altered gait pattern which may have been caused by a bad hip, knee, foot, leg length disparity, or some other factor. *Id*. at 44. On June 2, 1995, Claimant was having difficulty with weight bearing and torsional activities and required the use of a cane. *Id*. at 25. Dr. Kinnett also observed a two plus pitting edema, meaning that when he pressed Claimant's skin, the subcutaneous tissue pitted and on a one to four scale, Claimant's reaction was a two. *Id*. at 46. By July 3, 1995, Claimant's edema was almost completely resolved, but Dr. Kinnett stated that he would make no changes in Claimant's work limitations. *Id*. at 46-47. In September 1995, Dr. Kinnett noted that Claimant's edema had returned, which was related to his original knee injury, and he referred Claimant back to Dr. Shurden for continued care. *Id*. at 47-48.

On September 18, 1995, Claimant returned to Dr. Kinnett referencing pain in his shoulder for the first time. (ALJX 2, p. 48). Claimant related that the injury was due to an accident on July 26, 1994 when he was at work and a sixty foot long piece of one-half inch metal fell on his anterior chest wall, elbow upper arm, causing lacerations to his hand. *Id*. Claimant related that while his hand lacerations were his immediate concern, he noticed progressive shoulder pain and weakness. *Id*. at 49. Claimant's physical exam demonstrated limitation of motion in his left shoulder, subacromial crepitus with shoulder motion, tenderness to palpation, weakness in abduction, and a rupture of the distal insertion of the biceps. *Id*. at 50-51. Most ruptures to the distal insertion of the biceps are induced by trauma through a jerking or resistance motion rather than by blow from a foreign source. *Id*. at 52. X-rays revealed a marked loss of subcrominal space with degenerative changes that were at least two or three months old. *Id*. at 53-54. Dr. Kinnett's impression was a rotator cuff tear with impingement syndrome. *Id*. at 54.

A subsequent MRI demonstrated a massive tear of the rotator cuff with retraction but no evidence of ruptured distal biceps. (ALJX 2, p. 56-57). After Claimant's September 18, 1995 examination, Dr. Kinnett stated that Claimant should not work at all with his left upper extremity and he could only use it for the activities of daily living. *Id*. at 57. Claimant was a candidate for arthrotomy surgery, whereby Dr. Kinnett would open the shoulder, find the retracted cuff tear, debride it, immobilize it, and suture back to its anatomic insertion. *Id*. at 58. Dr. Kinnett also recommended a acromioplasty, performed during the arthrotomy, to create more room between the roof of the shoulder and the shoulder so as not to interfere with the healing of the rotator cuff. *Id*. at 58-59. Convalescence from such surgery lasted four to six months. *Id*. at 62-63. If surgery was successful, Dr. Kinnett opined that claimant could return to his normal activities. *Id*. at 63.

In November 1995, Dr. Kinnett treated Claimant for his knee, but did not note any significant changes. (ALJX 2, p. 59). Likewise, a January 9, 1996 evaluation of Claimant's knee did not reveal any change, and on July 15, 1996, Claimant merely continued to complain about pain in his knee and shoulder. *Id*. at 60-61. Similarly, Dr. Kinnett did not detect any appreciable change in Claimant's shoulder condition. *Id*. at 61. Claimant's treatment options for his knee was either to do nothing surgically, or have a surface replacement arthroplasty, knee fusion, and debridements. *Id*. at 63. Assuming that claimant elected not to have the surgery, then he had reached maximum medical improvement as documented in his reports.[3] *Id*. at 64-65.

(4) Deposition Testimony of Dr. Ira P. Markowitz

Employer noticed the deposition of Dr. Markowitz, an expert in the field of vascular surgery, on November 19, 1998. (ALJX 1, p. 1, 4). Dr. Markowitz first treated Claimant on September 20, 1996, at the request of Dr. Kinnett, in relation to phlebitis in his left leg. *Id*. at 5-6. Although Claimant complained of discomfort in his left calf dating back six to eight months, Dr. Markowitz stated that Claimant's orthopaedic surgery made Claimant more prone to develop thrombophlebitis. *Id*. at 6- 7. Claimant denied having any previous trauma, situations of stasis or damage, long plane rides, or motor vehicle accidents, all potential sources for developing thrombophlebitis, and Dr. Markowitz related that orthopaedic surgery was a major cause of deep vein thrombophlebitis due to the anesthetics given and the inactivity following surgery. *Id*. at 8, 12.

Claimant related to Dr. Markowitz that he was taking Coumadin, a blood thinner, starting in 1984, well before his orthopaedic surgery. (ALJX 1, p. 9). Dr. Markowitz stated that he did not know any reason why a patient would take Coumadin for more than a year unless the patient had a diagnosis of some abnormal blood coagulation hereditary type problem. *Id*. at 10. In his physical exam of Claimant, Dr. Markowitz noted Claimant had a weak pulse in his legs, an abnormal noise in his left groin,[4] and hyperpigmentation in the leg implying a chronic venous insufficiency. *Id*. at 14-15. Claimant's thrombophlebitis could also be due to his advanced age, hypertension or diabetes, but it could not be caused by a hardening of the arteries. *Id*. at 14, 16, 19. Dr. Markowitz's opinion that Claimant's thrombophlebitis was due to his orthopaedic surgery was based on the timing of events because the thrombophlebitis manifested soon after surgery. *Id*. at 16.

On October 21, 1997, over a year after Claimant's knee surgery, Dr. Markowitz had arterial tests performed that measured the blood flow to his feet and hands, and had his leg veins checked for clotting. (ALJX 1, p. 20). The results showed that Claimant had a clot in his femorial vein that was still present from his orthopaedic knee surgery. *Id*. at 21-22. Treatment for that condition consisted of a compression hose, or a stocking to help push the blood back up the leg, and exercise. *Id*. at 22.

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[3] Dr. Kinnett's report detailing a date for maximum medical improvement was not submitted into evidence.

[4] Dr. Markowitz opined that this was due to atherosclerosis, or a hardening of the arteries, due to diabetes or hypertension. (ALJX 1, p. 19).

Claimant's chief complaint in October 1997, however, concerned bilateral leg ulceration, cellulitis, and severe edema. *Id*. at 23-24. Claimant also had a bruit, or an abnormal noise in his neck, but that was related to diabetes and hypertension and not this workplace accident or subsequent knee surgery. *Id*. at 26. Similarly, arterial sclerosis and thrombophlebitis were not caused by the same phenomena because arterial sclerosis was due to cholesterol, lack of exercise, diabetes, hypertension and smoking, and thrombophlebitis was due to stasis, hypercoagulability, or damage due to minimal trauma. *Id*. at 26-27.

Claimant also had no measurable flow of blood to his left hand due to the fact that Claimant had blockage of arteries in his hand. (ALJX 1, p. 27-28). Claimant's third and fourth digits were ischemic, cold and blue. *Id*. at 28. Dr. Markowitz did not connect the fact that Claimant did not have any blood flow past his left wrist to any prior injury. *Id*. at 29. Rather, Claimant's problems stemmed from the fact that he had a hereditary disease process, a macroglobulinemia, or blood disorder that caused blood in the hands and toes to become blocked. *Id*. at 30. Claimant's condition was not related to any trauma. *Id*.

Dr. Markowitz noted that the skin on Claimant's leg was breaking down, and Claimant also had an infection. (ALJX 1, p. 31). Mr. Markowitz placed Claimant on bed rest, on antibiotics, and attempted to decrease the pressure in his leg to promote arterial flow and help heal his ulcerations. *Id*. at 31. Claimant eventually lost part of his fingers and toes due to the disease process. *Id*. at 31. As of October 1997, Claimant's thrombophlebitis had healed, and as a simultaneous process, Claimant had vein ulcers on the lateral part of his leg and arterial ulcers restricting blood flow to his toes. *Id*. at 32. The loss of his toes did not related to Claimant's thrombophlebitis. *Id*. at 32.

Claimant developed a new ulceration on July 27, 1998, on his lateral left leg that was related to his thrombophlebitis. (ALJX 1, p. 32-33). The ulceration was disabling in that Claimant was unable to stand on his leg for more than four to six hours a day. *Id*. at 33. When Claimant sat down, he needed to keep his legs elevated, and get up from any static position every half-hour to walk. *Id*. While Claimant could climb stairs, he should not climb ladders. *Id*. at 33-34. Thrombophlebitis would not stop Claimant from lifting, but motion without resistance was best for his condition and Dr. Markowitz did not think that Claimant should lift much more than ten pounds. *Id*. at 34-35. By November 13, 1998, Dr. Markowitz remarked that seventy percent of Claimant's ulcer had resolved and a complete recovery was expected no later than December 18, 1998. *Id*. at 37. At that date, Claimant's work restrictions would change back to those regarding his thrombophlebitis only. *Id*. Because Claimant had not reached maximum medical improvement, Dr. Markowitz did not assign a permanent impairment rating. *Id*. at 39-40.

(5) Medical Records of Terry L. Habig

At the request of Employer, Dr. Habig, a orthopaedic surgeon, evaluated Claimant on November 29, 1995, in regards to his left knee pain and Dr. Kinnett's recommendation for a total knee replacement. (EX 14, p. 1). Dr. Habig's physical examination revealed that Claimant lacked ten degrees of full extension in the left knee, about five degrees of flexion, and Claimant had no instability. *Id*. at 2. Dr. Habig opined that Claimant developed thrombophlebitis after undergoing

arthroscopic surgery on his left knee. *Id*. Although Claimant's osteoarthritis pre-existed his knee injury, Dr. Habig stated that the workplace injury may have aggravated Claimant's condition. *Id*. Claimant had sufficient problems with his knee to warrant a total knee replacement, but when the procedure should be performed depended on how much pain Claimant was in, the safety of surgery considering his thrombophlebitis, and the opinion of his internist. *Id*. In total, Dr. Habig estimated that Claimant's disability was 15-20%, reduced to some extent because Dr. Habig felt that some of the problem with his knee was pre-existing. *Id*. If Claimant elected not to have surgery, then Claimant reached maximum medical improvement, apart from his thrombophlebitis, on November 29, 1995. *Id*. at 4.

(6) Medical Records and Deposition Testimony of Dr. John McLachlan

On July 26, 1994, Dr. McLachlan, an orthopaedic surgeon, began treatment of Claimant's left hand injury in relation to a workplace accident that occurred on the same day. (EX 17, p. 11). Claimant had a two to three centimeter laceration across the palmar surface of his hand that was approximately one centimeter deep. *Id*. Dr. McLachlan's plan was to admit Claimant to the hospital to perform a surgical repair. *Id*. at 12. The procedure Dr. McLachlan performed was debridement, cleansing, repair of the flexor sublimis and profundus tendons, and repair of the pulley and synovial sheath. *Id*. at 15.

On August 9, 1994, Dr. McLachlan reported that Claimant's hand was in a cast to protect his repaired tendons, and he was undertaking exercises to improve his range of motion. (EX 17, p. 59). Claimant was reaching the point where he could do sedentary work, but he would be unable to use his upper extremity. *Id*. By October 4, 1994, Dr. McLachlan noted that Claimant's sutures were removed, Claimant was continuing his hand exercises, his cast and wrist band were removed, and he noted that Claimant could return to light duty work on September 9, 1994. *Id*. at 56-57. On October 4, 1994, Dr. McLachlan stated that Claimant was ready for light to medium level work with specific instructions regarding his hand. *Id*. at 57.

On January 20, 1995, Dr. McLachlan noted that Claimant was, and had been able, to return to work from an orthopaedic standpoint in relation to his hand injury. (EX 17, p. 3). On February 10, 1995, Dr. McLachlan remarked that Claimant had an excellent result from his hand surgery, and on January 9, 1995, he had released Claimant to return to his regular duties. (EX 17, p. 1, 4). Although Claimant still lacked ten degrees of extension in the PIP joint, and had minor problems with flexion of the injured finger, Dr. McLachlan thought that Claimant's limitations would gradually improve. *Id*.

On May 15, 1995, Dr. McLachlan reported that Claimant had reached maximum medical improvement in regards to his hand injury. (EX 17, p. 70). On July 24, 1995, Dr. McLachlan again wrote that Claimant had reached maximum medical improvement and he discharged Claimant from his care. (EX 17, p. 46; EX 18, p. 16). Claimant had a fifty percent permanent impairment to his index finger, but was capable of returning to his former job. (EX 17, p. 46). Claimant could have

returned to his normal duties on January 9, 1995, but the problems with Claimant returning to work was not his hand, rather, it was his knee condition. (EX 18, p. 17).

In an August 19, 1995 deposition, Dr. McLachlan related that Claimant never complained to him of a shoulder, elbow, back, or neck injury. (EX 18, p. 8). When relating that Claimant could return to sedentary or light work, Dr. McLachlan testified that he qualified the recommendation by stating that Claimant was not to use his hand in any manner whereby his finger could be stretched or pulled. *Id*. at 11. Also, Claimant should not engage in any work that entailed pulling or that put stress against the tips of his fingers. *Id*. at 14. Claimant had complained to Dr. McLachlan about pains other than in his hand during his last visit on June 26, 1995, but the number of complaints Claimant had relative to what Dr. McLachlan was treating were totally out of proportion and did not make any sense to him. *Id*. at 18-20. Claimant may have complained about his shoulder, but Dr. McLachlan did not record the myriad of complaints. *Id*. at 20-21.

(7) Vocational Records of Riggles & Associates and Deposition of Nicole Solis

On September 9, 1996, vocational counselor Michelle Brondum reported that she met Claimant in his attorney's office to discuss the results of his vocational testing. (EX 20, p. 161). Claimant was most similar to people engaging in occupations under the realistic, enterprising, and social themes, and he was most interested in manual or skilled trades, carpentry and mechanical/fixing. *Id*. at 161-62. In achievement tests, Claimant scored an 8.9 grade equivalency in letter word identification, a 7.6 grade level in passage comprehension, a 6.7 grade level in mathematical calculation, a 13.1 grade level in applied problem math, and a 5.9 grade level equivalency in written language writing samples. *Id*. at 181. Claimant's vocational background consisted of working on a farm until the age of eighteen, working as a laborer at King Lumber Co., working three months in a cafeteria, working sixteen years at Alumiglass as a tack welder and working his remaining years at Halter Marine. *Id*. at 190-91. Claimant denied having any computer experience. *Id*. at 191.

Employer noticed the deposition of Nicole Solis, a case manager for the vocational rehabilitation company of Riggles and Associates assigned to Claimant's case, on November 5, 2002. (EX 21, p. 1). Ms. Solis testified that she was never able to meet with Claimant, and her vocational report was based on the work of a prior counselor who had tested Claimant and obtained an educational and work history. *Id*. at 5-6. Ms. Solis also met with Dr. Kinnett on July 19, 2002, wherein Dr. Kinnett indicated that Claimant post traumatic degenerative arthritis of the left knee which limited his range of motion and ambulation. (EX 19, p. 24; EX 21, p. 8-9). Claimant was a candidate for surface replacement arthroscopy, was not at maximum medical improvement, and was not able to return to any form of work. (EX 19, p. 24). Based only on Claimant's work-related injuries, however, Dr. Kinnett expressed to Ms. Solis that Claimant may be able to work with the restrictions of: limited standing and walking, no stooping, squatting, climbing, no lifting over twenty-

five pounds, and Claimant should be allowed to infrequently alternate sitting and standing.[5] *Id*. Ms. Solis also reviewed the medical records of Drs. McLachlan and Markowitz. (EX 21, p. 8).

Based on Dr. Kinnett's work-related July 19, 2002 restrictions, Ms. Solis identified the following jobs for Claimant:

> Towne Park - Parking Cashier. Located in New Orleans, Louisiana, this job paid $6.00 per hour, was full time and was available on July 25, 2002. (EX 20, p. 6). The position was sedentary, required constant sitting, and the employee could stand and stretch as needed. The job entailed accepting cash from parking customers and tracking keys for valets. *Id*. at 7.
>
> Hilton New Orleans Riverside - Parking Cashier. Located in New Orleans, Louisiana, this job paid $5.40 per hour, was full time and was available on July 25, 2002. (EX 20, p. 8). The position was sedentary, required constant sitting, and the employee could stand and stretch as needed. The job entailed accepting cash from parking customers. *Id*. at 9.
>
> Gretna Courthouse - Parking Cashier. Located in Gretna Louisiana, this position paid $6.00 per hour, and was available on August 6, 2002. (EX 20, p. 1; EX 21, p. 10).

Even with amputated fingers, Ms. Solis thought that Claimant could perform the positions as parking lot attendants because all rates were in whole dollar amounts and Claimant indicated at trial that he could handle paper money. (EX 21, p. 10-11). The cashier positions were sedentary, full, or part time, and consisted of accepting parking tickets from patrons, totaling parking charges, accepting payments, hanging up keys returned by valets and then returning those keys. (EX 20, p. 3, 6, 8). Reviewing Claimant file back to 1996, Ms. Solis testified that Claimant was capable of performing all the positions listed in his file based on Dr. Kinnett's 1996 and 2002 restrictions. (EX 21, p.11-21). When Ms. Solis met with Dr. Kinnett in July 2002, she brought sample job samples, but Dr. Kinnett refused to review them. (EX 21, p. 22).

Prior to Ms. Solis' involvement in this case, an earlier vocational rehabilitation expert identified the following positions:

> Mail Processing Specialities, Inc. - Mail-room worker. Located in Metairie, Louisiana, this job paid $5.00 per hour, full time and was available on November 11, 1996. (EX 20, p. 135). The job required rare stooping, frequent sitting and standing, and occasional walking. *Id*. The employee stuffed and labeled envelopes keeping them in zip code order and could sit or stand during the day. *Id*. at 136.
>
> Shell - Cashier. Located in Metairie, Louisiana, this position paid $5.00 an hour, full time, and was available on November 12, 1996. (EX 20, p. 137). The job was sedentary, required

[5] Dr. Kinnett's report from July 19, 2002, and a second deposition, dated October 23, 1998, were not submitted into evidence.

frequent sitting and standing, occasional walking, and rare stooping. *Id*. The job entailed selling convenient store items, gas, stocking shelves, and inside cleaning. *Id*. at 138. A second position at Shell was identified as being available on November 1, 1996, paying $4.75 an hour. *Id*. at 141-42.

Dixie Parking - Cashier. Located in New Orleans, Louisiana, this position paid $4.75 an hour, was full time and was available on November 1, 1996. (EX 20, p. 139). The job was sedentary, required frequent sitting and standing, rare walking and rare stooping. *Id*. at 139. The employee would answer phones, accept cash and give proper change. *Id*. at 140.

Guardsmith, Inc. - Alarm Monitor. Located in New Orleans, Louisiana, this position paid $6.00 an hour, was full time, and was available on October 30, 1996. (EX 20, p. 143). The position was sedentary, required frequent sitting, occasional standing, and rare walking. No stooping was involved. *Id*. The job entailed sitting in a booth and watching a security monitor, and the employer preferred both security and computer experience. *Id*. at 144.

Victor Manning Driving - Driving Instructor. Located in Metairie, Louisiana, this position paid $6.00 an hour, was full time, and was available on September 25, 1996. The job was sedentary, and required frequent sitting, occasional standing and walking, and rare stooping. (EX 20, p. 145). The job entailed teaching others automobile skills including vehicle operation. *Id*. at 146.

AA Speedy Openers - Locksmith Trainee. Located in New Orleans, Louisiana, this position paid $6.00 per hour, was full time, and available on October 15, 1996. (EX 20, p. 147). The position was sedentary to light and required occasional standing, walking, kneeling, and stooping. *Id*. The job entailed retrieving keys from locked cars and lock repair. *Id*. at 148.

Tulane University Medical Center - Watch-person. Located in New Orleans, Louisiana, this position paid $5.42 an hour, was full time, and was available on July 3, 1996. The job was sedentary, required frequent sitting and standing, and required rare walking. (EX 20, p. 149). The job entailed monitoring and responding to electronic surveillance and calling police as needed. *Id*. at 150.

Piccadilly Cafeteria - Cashier. Located in Metairie, Louisiana, this position paid $5.00 per hour, was full time and was available on October 7, 1996. (EX 20, p. 151). The position was sedentary, required occasional sitting, standing, and walking, and required rare stooping and climbing. *Id*. The position entailed accepting payments, accepting orders for take out items, and carrying packaged food. *Id*. at 152.

Marriott Garage - Cashier. Located in New Orleans, Louisiana, this position paid $5.50 an hour, was full time, and was available on July 18, 1996. (EX 20, p. 153). The position was sedentary, with frequent sitting, occasional walking, and rare stooping. *Id*. The job required

the employee to complete cash transactions, and to accept and return keys to valets. *Id*. at 154.

Marshall Bros. - Auto Dispatcher. Located in Metairie, Louisiana, this position paid $4.50 an hour, was full time, and was available on July 26, 1996. (EX 20, p. 155). The position was sedentary to light, and required frequent sitting and standing, occasional walking, and rare climbing and stooping. *Id*. Th position entailed dispatching cars to mechanics, making appointments, scheduling, data entry, answering telephones, operating a switchboard, and referring to books for billing purposes. *Id*. at 156.

IV. DISCUSSION

A. Causation of Claimant's Macroglobulinemia, Amputations, Shoulder and Back Injuries

Employer does not dispute that Claimant's July 1, 1993 injury and subsequent thrombophlebitis, as well as a July 26, 1994 hand laceration are injuries that arose out of, and in the course and scope of Claimant's employment. In establishing a causal connection between the injury and claimant's work, all factual doubts must be resolved in favor of the claimant. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998) (quoting *Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991). Ordinarily the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. 556(d) (2001). By express statute, however, the Act presumes that a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary. 33 U.S.C. § 920(a) (2001). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. *Director, OWCP v. Greenwich Colleries*, 512 U.S. 267, 281 (1994); *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999); 5 U.S.C. 556(d) (2001). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998) (pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995) (pre-existing back injuries); *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979) (compensating the effects of a progressive degenerative condition when that condition was aggravated by conditions at work), *aff'd sub nom., Gardner v. Director*, OWCP, 640 F.2d 1385 (1st Cir. 1981).

A(1) The Section 20(a) Presumption - Establishing a *Prima Facie* Case

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2) (2001). Section 20(a) of the Act provides a

presumption that aids the claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary - -
>
> (a) That the claim comes within the provisions of this chapter.

33 U.S.C. § 920(a) (2002).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between the work and the harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. "[T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983)(stating that a claimant must allege injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990)(finding the mere existence of an injury is insufficient to shift the burden of proof to the employer). Once both elements of the *prima facie* case are established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d 287-88.

A(1)(a) Existence of Physical Harm or Pain

In order to show harm or injury a claimant must show that something has gone wrong with the human frame. *Southern Stevedoring Corp. v. Henderson*, 175 F.2d. 863 (5th Cir. 1949); *Crawford v. Director, OWCP*, 932 F.2d 152 (2nd Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307 (D.C.Cir. 1968). An injury cannot be found absent some work-related accident, exposure, event or episode and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. *Schoener v. Sun Shipbuilding and Dry Dock Co.*, 8 BRBS 630 (1978). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998) (pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995) (pre-existing back injuries).

In this case, Claimant established that he suffered a harm in that he has macroglobulinemia, hand and toe amputations, and shoulder injuries, however, Claimant failed to establish that he suffered any harm to his back. The only medical record in evidence showing any back pain is a May 1, 1995 complaint to Dr. Kinnett. (ALJX 2, p. 41-42). Dr. Kinnett related that Claimant's back pain may be due to an altered gait pattern caused by a bad hip, knee, foot, leg length disparity, or some other factor. *Id*. at 44. There is no showing that Claimant's back needs treatment, that it impairs his ability to work, or that Claimant has any organic back pain related to either of his workplace accidents. Apart from Claimant's subjective complaint, there is no evidence that anything had gone wrong. Furthermore, Claimant made a nearly identical complaint to Dr. Shurden in December 1990. (EX 16, p. 11). Although Dr. Shurden ordered x-rays of Claimant's spine, none were ever taken in December 1990, and there is no evidence in the record of any lumbar x-rays films taken after Claimant's workplace injuries.

A(1)(b) Establishing that an Accident Occurred in the Course of Employment, or that Conditions Existed at Work, Which Could Have Caused the Harm or Pain

Although a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm, a claimant must show the existence of working conditions that could conceivably caused the harm alleged harm beyond a "mere fancy or wisp of 'what might have been.'" *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968). A claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. *See v. Washington Metropolitan Area Transit Authority*, 36 F.3d 375, 379 (4th Cir. 1994) (finding the harm related to the claimant's work based on his credible testimony and the medical evidence); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980) (same). On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or that conditions existed at work that could have caused the harm. *Bonin v. Thames Valley Steel Corp.*, 173 F.3d 843 (2nd Cir. 1999) (unpub.) (upholding ALJ ruling that Claimant did not produce credible evidence that a condition existed at work which could have cause his depression); *Alley v. Julius Garfinckel & Co.*, 3 BRBS 212, 214-15 (1976) (finding the claimant's uncorroborated testimony on causation not worthy of belief); *Smith v. Cooper Stevedoring Co.*, 17 BRBS 721, 727 (1985) (ALJ) (finding that the claimant failed to meet the second prong of establishing a *prima facie* case because the claimant's uncorroborated testimony linking the harm to his work was not supported by the record).

For a traumatic injury case, the claimant must show a specific traumatic event, more than just working conditions that required repetitive bending, stooping, climbing, or crawling. *Leblanc v. Cooper/T. Stevedoring, Inc.*, 130 F.3d 157, 160-61 (5th Cir. 1997) (finding that back injuries due to repetitive lifting, bending and climbing ladders are not peculiar to employment and are not treated as traumatic injuries); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 177-78 (2nd Cir. 1989) (finding that a knee injury due to repetitive bending stooping, squatting and climbing is not an

occupational disease). Conditions that are due to congenital and degenerative factors do not constitute a compensable injury. *Lennon v. Waterfront Transport*, 20 F.3d 658, 663 (5th Cir. 1994) (degenerative disc disease); *Director v. Bethlehem Steel Corp.*, 620 F.2d 60, 64-65 (5th Cir. 1980) (degenerative lumbar disc disease). Thus, a claimant's failure to show an antecedent event will prohibit the claimant from establishing a *prima facie* case and his entitlement to the Section 20 presumption of causation.

In this case, Claimant failed to establish that conditions existed at work, or existed during his subsequent course of treatment, that could have caused the his macroglobulinemia and its resulting hand and toe amputations. In his uncontradicted testimony, Dr. Markowitz stated that Claimant's macroglobulinemia, which led to the subsequent amputations of Claimant's fingers and toes, was caused by a hereditary blood disorder unrelated to any trauma.[6] (ALJX 1, p. 27-20). Likewise, in a simultaneous and unrelated process to his thrombophlebitis, Claimant had vein and anterior ulcers restricting blood flow to his toes. *Id*. at 32. No showing was made that Claimant's thrombophlebitis aggravated these pre-existing hereditary condition.

Unlike Claimant's macroglobulinemia, Claimant did present sufficient evidence to establish a *prima facie* case that his shoulder injury was caused by his July 26, 1994 workplace accident. Dr. Kinnett reported on September 18, 1995, that Claimant presented to him complaining of a left shoulder injury as related to his July 26, 1994 accident. (ALJX 2, p. 48). Significantly, Claimant had what appeared to be a rupture of the distal insertion of the biceps, which was caused when a force is applied against a flexed elbow, and the force exerted against the elbow is greater than the what the tendon can maintain resulting in a rupture. *Id*. at 52. If a heavy object hit a person's arm and the person also contracted their elbow against the weight then such an injury may be traumatically induced. *Id*. at 53. Dr. Kinnett's impression was that Claimant suffered a rotator cuff tear and impingement syndrome which may be due to a traumatic injury such as that suffered by Claimant on July 26, 1994. *Id*. at 54-55.

A(2) Rebuttal of the Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether Employer has succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995) (failing to rebut presumption through medical evidence that claimant suffered an unquantifiable hearing loss prior to his compensation claim against

[6] Likewise, Dr. Catherine McCormick, who also treated Claimant for macroglobulinema, stated that it was highly unlikely that this condition was related to a work injury. (EX 20, p. 58-59).

employer for a hearing loss); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144-45 (1990) (finding testimony of a discredited doctor insufficient to rebut the presumption); *Dower v. General Dynamics Corp.*, 14 BRBS 324, 326-28 (1981) (finding a physician's opinion based of a misreading of a medical table insufficient to rebut the presumption). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion-- only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also, Conoco, Inc.*, 194 F.3d at 690 (stating that the hurdle is far lower than a "ruling out" standard); *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983) (stating that the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995) (stating that the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.").

Here, Employer presented substantial evidence to rebut the presumption that Claimant's shoulder injury was causally related to his July 16, 1994 workplace accident. Outside of Clamant's testimony, there is no evidence that his July 26, 1994 injury caused an injury to his shoulder. Significantly, the ruptured distal biceps that led Dr. Kinnett to opine that Claimant's shoulder injury was traumatically induced, did not appear on a subsequent MRI. (ALJX 2, p. 57). Also, Claimant complained to Dr. Shurden about shoulder pain in December 1980, and he subsequently sought treatment at St. Claude General Hospital. (EX 16, p. 35). When Claimant presented to Dr. Shurden regarding shoulder pain a second time on January 12, 1996, Dr. Shurden opined that the pain may be related to a post-traumatic symptom from his December 1980 injury. *Id*. at 34. Also, Claimant's treating physician for his July 26, 1994 hand injury, Dr. McLachlan, began treating Claimant immediately, and in his August 19, 1995 deposition, Dr. McLachlan testified that he was unaware of any shoulder or neck injuries that Claimant may have due to that accident. (EX 18, p. 8). On June 26, 1995, Claimant did present to Dr. McLachlan with a myriad of complaints, but, the complaints were so far out of proportion to Dr. McLachlan's treatment that they did not make any sense to him. *Id*. at 18-21.

Not until September 18, 1995, nearly fourteen months after the accident, did Claimant presented to Dr. Kinnett complaining about shoulder pain. (ALJX 2, p. 48). Finally, in a self-written note to the Department of Labor, dated February 27, 1995, Claimant related that his July 26, 1994 workplace injury may have some permanent damage to his hand, but Claimant did not mention any

shoulder complaints. (EX 8, p. 1). Accordingly, I find that Employer presented substantial evidence that Claimant's shoulder injury was not related to his work because: Dr. Kinnett took Claimant's version as to causation at face value and a subsequent MRI ruled out Dr. Kinnett's theory that Claimant ruptured his distal biceps by a traumatic event; Dr. Shurden related Claimant post-accident shoulder pain to a post traumatic symptom of a pre-employment shoulder injury dating back to December 1980; Dr. McLachlan, who treated Claimant for his July 26, 1994 workplace injury, stated that Claimant did not report any shoulder pain stemming from that incident; and Dr. Kinnett could offer no explanation as to why Claimant failed to mention his shoulder pain despite their good relationship.

A(3) Causation on the Basis of the Record as a Whole

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286, 56 S. Ct. 190, 193, 80 L. Ed. 229 (1935); *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 288 (5th Cir. 2000); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Director, OWCP v. Greenwich Colleries*, 512 U.S. 267, 281 (1994).

Based on the record as a whole, Claimant failed to carry his burden of persuasion that his shoulder injury was related to his July 26, 1994 workplace accident. Given the paucity of any shoulder complaints in the record for nearly fourteen months after his workplace accident, and considering the facts presented by Employer in rebutting the Section 20(a) presumption, I find that Claimant's shoulder injury did not arise out of his employment on July 24, 1994.

B. Nature and Extent of Injury and Date of Maximum Medical Improvement

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

B(1) Nature of Claimant's Injury

The nature of Claimant's July 1, 1993 workplace injury is such that by March 1994, Claimant was suffering from a knee injury consisting of advanced tri-compartmental osteoarthritis with a complete loss of the medical joint space and varus alignment, and subchondral scelerosis. (ALJX 2, p. 10-11). Dr. Kinnett's impression was tri-compartmental osteoarthritis and post–traumatic synovitis of the left knee. *Id*. at 12. In subsequent arthroscopic surgery, Dr. Kinnett discovered free edge degenerative tears of the lateral meniscus, osteoarthritis, synovitis, traumatic articular cartilage flap, medial condyle, and traumatic disruption of the posterior third of the medial meniscus. *Id*. at 25. During arthroscopy, Dr. Kinnett corrected traumatic disruptions of the posterior third of the medial meniscus, the articular cartilage flap, and corrected degenerative tears in the lateral meniscus. *Id*. Subsequently, Claimant developed thrombophlebitis. *Id*. at 30, 33. On April 10, 1995, Dr. Kinnett also discussed the possibility of surface replacement arthroplasty after his thrombophlebitis had completely resolved. *Id*. at 39. Under the care of Dr. Markowitz, Claimant developed leg ulcerations connected with his thrombophlebitis on July 27, 1998, that resolved on December 18, 1998. (ALJX 1, p. 32-37).

On July 26, 1994, Claimant suffered a left hand laceration that was two to three centimeter across the palmar surface of his hand that was approximately one centimeter deep. (EX 17, p. 11). Dr. McLachlan's surgery consisted of debridement, cleansing, repair of the flexor sublimis and profundus tendons, and repair of the pulley and synovial sheath. *Id*. at 15.

B(2) Extent of Claimant's Disability

In relation to Claimant's knee injury, Dr. Naccari recommended on February 11, 1994, that Claimant's work activities be restricted to light duty with no lifting over twenty pounds, no squatting, climbing, heights, and no kneeling. (EX 13, p. 1, 3, 6). Dr. Kinnett's stated on March 21, 1994, that due to his knee injury, Claimant should not engage in repetitive stooping, squatting, or bending, he

should not perform heavy lifting in excess of thirty pounds, and Claimant should only do limited stair climbing. (ALJX 2, p. 12-13).

Following Claimant's September 27, 1994 arthroscopic surgery, Dr. Kinnett stated that he normally expected a patient to recover after three to four weeks, but to his knowledge, Claimant had not recovered by the time of his deposition on August 16, 1996 due to his intervening thrombophlebitis. (ALJX 2, p. 31). On November 16, 1994, after hospitalization for thrombophlebitis, Dr. Kinnett did not release Claimant to return to work activity. *Id*. at 32. Claimant remained disabled for any work activity in December, and Dr. Kinnett continued those restriction through February 1995 because Claimant's venous circulation was not completely resolved and he had persistent swelling and edema. *Id*. at 34-35.

On February 22, 1995, Dr. Kinnett released Claimant to return to light duty work, meaning that Claimant could not engage in repetitive stooping, squatting, or bending, no standing in one position longer than one hour, and no heavy lifting in excess of thirty pounds. (ALJX 2, p. 35-36). In relation to Claimant's knee injury and intervening thrombophlebitis, Dr. Shurden opined on February 24, 1995, that Claimant could not return to work, and the only activities he could perform safely were: moving his fingers, walking short distances, using his hands and arms, sitting, using his eyes and hearing. (EX 15, p. 1). On March 1, 1995, Claimant was still having trouble with his thrombophlebitis, and Dr. Kinnett added work restrictions such that Claimant was not to carry any significant amount of weight due his insecurity and pain in his left knee and his limited range of motion. (ALJX 2, p. 37). By July 3, 1995, Claimant's edema was almost completely resolved, but Dr. Kinnett stated that he would make no changes in Claimant's work limitations. *Id*. at 46-47. On November 29, 1995, Dr. Habig estimated that Claimant's disability was 15-20%, reduced to some extent because Dr. Habig felt that some of the problem with his knee was pre-existing. (EX 14, p. 2). As of the date of the deposition, on May 14, 1996, Dr. Shurden opined that Claimant's thrombophlebitis had resolved. (EX 16, p. 37-38).

On July 27, 1998, Dr. Markowitz assigned new restrictions for Claimant after he developed ulcerations related to his thrombophlebitis consisting of no standing on his leg for more than four to six hours a day. (ALJX 1, p. 33). When Claimant sat down, he needed to keep his legs elevated, and get up from any static position every half-hour to walk. *Id*. While Claimant could climb stairs, he should not climb ladders. *Id*. at 33-34. Thrombophlebitis would not stop Claimant from lifting, but motion without resistance was best for his condition and Dr. Markowitz did not think that Claimant should lift much more than ten pounds. *Id*. at 34-35. By November 13, 1998, Dr. Markowitz remarked that seventy percent of Claimant's ulcer had resolved and a complete recovery was expected no later than December 18, 1998. *Id*. at 37. At that date, Claimant's work restrictions would change back to those regarding his thrombophlebitis only. *Id*. On July 19, 2002, Dr. Kinnett reported to Employer's vocational expert that based on Claimant's work related injuries, Claimant's work restrictions would consist of: limited standing and walking, no stooping, squatting, climbing,

no lifting over twenty-five pounds, and Claimant should be allowed to infrequently alternate sitting and standing. (EX 19, p. 24).

Accordingly, in regards to Claimant's knee injury, I find that Claimant was able to work light duty from the time of his injury on July 1, 1993 through the time of his surgery on September 27, 1994, with specific restrictions of no lifting over twenty to thirty pounds, no repetitive squatting, stooping, climbing, bending, or kneeling. After his September 27, 1994 surgery, Claimant remained totally disabled until February 22, 1995, at which time he was able to engage in light duty work with restrictions of no repetitive stooping, squatting, or bending, no standing in one position longer than one hour, no heavy lifting in excess of thirty pounds, and no carrying any significant amount of weight. Activities that Claimant could perform safely included moving his fingers, walking short distances, using his hands and arms, sitting, using his eyes, and listening. These light duty restrictions continued until July 27, 1998, when Claimant developed ulcerations related to his thrombophlebitis and Claimant was further limited to no standing on his leg for more than four to six hours a day, keeping his legs elevated when he sat down, one-half hour position changes from any static position, no climbing of ladders, and no lifting over ten pounds. These restrictions lasted from July 27, 1998, to December 18, 1998, at which time his restrictions set on February 22, 1995, went back into effect until July 19, 2002 at which time Claimant's condition had deteriorated such that he could only do limited standing and walking, no stooping, squatting, climbing, no lifting over twenty-five pounds, and Claimant needed to alternate sitting and standing.[7]

In regards to Claimant's hand injury, Dr. McLachlan stated on August 9, 1994, that Claimant was capable of performing sedentary work, but he would be unable to use his upper extremity. (EX 17, p. 59). On October 4, 1994, Dr. McLachlan noted that Claimant could have returned to light duty work on September 9, 1994. *Id*. at 56-57. Also on October 4, 1994, Dr. McLachlan stated that Claimant was ready for light to medium level work with specific instructions regarding his hand. *Id*. at 57. On January 20, 1995, Dr. McLachlan noted that Claimant was, and had been able, to return to work from an orthopaedic standpoint in relation to his hand injury. (EX 17, p. 3). On February 10, 1995, Dr. McLachlan remarked that Claimant had an excellent result from his hand surgery, and

[7] Due to his unrelated conditions, Claimant may well be totally disabled from any employment. In determining whether Employer demonstrated a residual wage earning capacity after a work related injury, however, I can only consider the affect of that work related injury on Claimant's physical ability to return to gainful employment. *See Walters v. Ingalls Shipbuliding, Inc.*, 116 F.3d 1477, 31 BRBS 75 (5th Cir. 1997) (table) (determining that the reason a claimant could no longer perform a modified light duty position following a work related injury was due in part to an unrelated heart condition, thus, the employer was not liable for any loss of wage earning capacity flowing from that condition); *James v. Atlantic & Gulf Stevedores*, 2 BRBS 222 (1975) (ALJ) (finding a claimant entitled to twenty-five percent partial disability attributable to work when the remaining seventy-five percent of his disability was related to a psychiatric condition and a stroke that was unrelated and occurred after the injury).

on January 9, 1995, he had released Claimant to return to his regular duties. (EX 17, p. 1, 4). Although Claimant still lacked ten degrees of extension in the PIP joint, and minor problems with flexion of the injured finger, Dr. McLachlan thought that Claimant's limitations would gradually improve. *Id*. Claimant had a fifty percent permanent impairment to his index finger, but was capable of returning to his former job. (EX 17, p. 46). Accordingly, I find that based on Claimants hand injury, Claimant was unable to work from the date of his surgery, July 26, 1994, to August 9, 1994, when he was capable of sedentary work without using his upper extremity. On October 4, 1994, Claimant was capable of performing light to medium work, and on January 9, 1995, Claimant was capable of returning to full duty.

B(3) Maximum Medical Improvement

In regards to Claimant's knee and intervening thrombophlebitis, I find that he reached maximum medical improvement on May 14, 1996, the date Dr. Shurden noted that Claimant's thrombophlebitis had completely resolved. (EX 16, p. 37038). On July 3, 1995, Dr. Kinnett had noted that Claimant's edema had almost completely resolved. (ALJX 2, p. 46-47). Apart from a temporary deterioration of his condition in September 1995, Dr. Kinnett did not note any changes in his November 1995, or July 15, 1996 examinations of Claimant, and Dr. Kinnett never altered Claimant's work restrictions after that date.[8] *Id*. at 47-48, 59-61. Additionally, Dr. Kinnett released Claimant back into the care of his family physician, Dr. Shurden in September 1995 for continued monitoring of Claimants' thrombophlebitis. (ALJX 2, p. 47-48). Dr. Habig, who evaluated Claimant on November 29, 1995, expressed the opinion that Claimant was still suffering from thrombophlebitis on the date of his visit. (EX 14, p. 4). Dr. Shurden opined in his deposition, dated May 14, 1996, that Claimant's thrombophlebitis had resolved. (EX 16, p. 37-38). In Dr. Markowitz's November 18, 1998 deposition, he opined that Claimant had not reached maximum medical improvement, but I note that at that time Dr. Markowitz was treating a flare-up of symptoms related to Claimant's thrombophlebitis that he expected to totally clear up the following month. (ALJX 1, p. 37-40). Claimant's Claimant's condition did not improve over his physical state in May 1996. (ALJX 1, p. 32-37). In regards to Claimant's hand injury, Dr. McLachlan's uncontradicted testimony is that Claimant reached maximum medical improvement on May 15, 1995. (EX 17, p. 70).

C. Prima Facie Case of Total Disability and Suitable Alternative Employment

C(1) Prima Facie Case of Total Disability

[8] Dr. Kinnett stated that Claimant has an option of having surgery for a knee replacement when his thrombophlebitis completely resolved. There is no evidence that Claimant had requested such a procedure in the record and no evidence that Employer/Carrier had refused to provide such care. Because I am unable to ascertain whether Claimant is still seeking treatment with a view toward improvement, Claimant's status may revert back to temporary disability at a future date.

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 156 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). Here, there is no dispute that Claimant cannot return to his former job as a fitter for Employer, thus, Claimant established a *prima facie* case for total disability.

C(2) Suitable Alternative Employment

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996); *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991)(crediting employee's statement that he would have constant pain in performing another job). An employer may establish suitable alternative employment retroactively to the day Claimant reached maximum medical improvement. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). Employer may also establish suitable alternative employment by offering the claimant a position within its facility so long as it does not constitute sheltered employment. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc.., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably

> capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

C(2)(A) Suitability of Job in Employer's Facility

Ordinarily, and employer is not a long term grantor of employment. *Olsen v. Triple A Machine Shops*, 25 BRBS 40 (1991); *Edwards v. Todd Shipyards Corp.*, 25 BRBS 49 (1991). Once an injured employee establishes a *prima facie* case of total disability, is offered a light duty position or modified work in the employer's facility, and the employee is laid off due to reasons not associated with his performance, the light duty job within the employer's facility does not establish suitable alternative employment or post injury wage earning capacity. *Northfolk Shipbuilding & Dry Dock Co. v. Hord*, 193 F.3d 797, 801 (4th Cir. 1999) (determining that the employer made a post-injury light duty position "unavailable" through a lay-off and to rebut the employees *prima facie* case of total disability the employer had to do more than point to its own internal light duty job); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22, 25 (1988) (finding that once the employer laid the injured worked off from his post-injury light duty job the suitable alternative employment was no longer available and the employer failed to prove that the injured worker could perform other work).

An employer is entitled to undertake legitimate personnel actions without incurring liability under the Act. *Brooks v. Newport News Shipbuilding & Dry Dock Co.*, 26 BRBS 1,6 (1996), *aff'd* 2 F.3d 64 (4th Cir. 1993) (terminating an injured employee from his light duty position within employer's facility for breaking company rules relates to the employees misfeasance and not his disability, thus, any subsequent loss of wage earning capacity is not due to the claimant's disability and employer need not show further alternative employment); *Marino v. Navy Exchange*, 20 BRBS 166 (1988) (finding that a psychological injury resulting from a legitimate personnel action was not compensable); *Harrod v. Newport New Shipbuilding & Dry Dock Co.*, 12 BRBS 10, 16 (1980) (determining that an injured employee's termination for violating a company's firearm policy did not obligate the employer to establish additional alternative employment when the evidence suggested that the injured worker could perform the light duty position). *Cf. Newport News Shipbuilding & Dry Dock Co. v. Riley*, 262 F.3d 227, 232-33 (4th Cir. 2001) (finding that a non-discriminatory termination for cause does not suffice to carry the burden of showing the availability of suitable alternative employment following a *prima facie* case of total disability).

Here, Claimant testified that he returned to light duty work in March 1995 in Employer's facility taking inventory on stock located in the shipyard. (Tr. 29, 32). Claimant testified that the job was more sedentary than light, that he was capable of performing the job, but after three days he was terminated for failure to take a drug test. (Tr. 29-31). Specifically Claimant stated:

> [A]nd they wanted me to sign some papers stating that they'd give me another job position, at the time, which was going to give me lower pay. I didn't want that because I wanted to feel like that I was going to be able to go back to work and do my regular job.
>
> And so then they came up with a bunch of tests they wanted me to take. They wanted me to sign these papers and then take this drug test. Well I didn't have no objection to taking a drug test but then, somehow or another, they wanted - - if I didn't sign the paper I couldn't take the drug test. And it was a, kind of a more or less blank piece of paper but they had a lot of sentences on it but nothing was filled out on it. They just wanted me to sign the bottom of the paper and then go take the blood, the drug test.
>
> And I told them I have no objection of taking the drug test, but let me take the paper home and take a look at it good, so I can understand what I'm signing, and bring it back to you. Because I really wasn't well at the time. I still was having some pain because of that phlebitis in the leg. So at first, the lady told me, very nice people, she told me that, yeah, I could. But by the time it for me to knock off that day she said no, they couldn't let me do that. And told me I either had to sign the paper and take the drug test or be terminated. And so I was terminated.

(Tr. 29-30).

Claimant clearly stated at trial that he was capable of performing the work. (Tr. 52). There is no record submitted or issue raised by Claimant contesting that his light duty inventory job constituted sheltered employment or that his termination was discriminatory in violation of 33 U.S.C. § 949a (2002). No showing was made that Claimant's job violated his work restrictions. Based on the evidence in the record, I find that Employer established suitable alternative employment with its offer of light duty work at its facility, and that Claimant was subsequently discharged in violation of a company policy, an event unrelated to his disability, relieving Employer of its duty to establish suitable alternative employment after March 6, 1995.[9]

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[9] According to Employer's LS-208, Claimant was able to return to work after March 6, 1995 and that was the last day Employer paid Claimant temporary total disability. (EX 2, p. 1).

Employer also identified numerous jobs available in 1996, and three positions available in 2002. Based on the jobs descriptions, *supra*, I find that Claimant had a residual wage earning

D. Claimant's Entitlement to Benefits

Claimant testified that following his July 1, 1993 workplace injury to his knee he did not miss any work until July 27, 1994, when he suffered a hand laceration that required surgery during his second workplace accident. (Tr. 25). Although Claimant was capable of returning to a limited form of work as early as August 9, 1994, (EX 17, p. 59), Employer did not offer Clamant a position, and Claimant subsequently underwent knee surgery on September 27, 1994, which rendered him totally disabled until February 22, 1995, when Dr. Kinnett released Claimant to return to work with restrictions. (ALJX 2, p. 31-36). On March 6, 1995, Employer offered Claimant a light duty position within his restrictions that Claimant testified he was capable of performing. (Tr. 52; EX 2, p. 1). Accordingly, I find that Claimant is entitled to temporary total disability from July 28, 1994 to March 6, 1995.

Claimant testified that his light duty position on March 7, 1995, was full time (forty hours) and paid $11.25 per hour ($450.00 per week). (Tr. 56). Claimant stated that he was an "overtime man" who worked overtime "if they had it." (Tr. 56). No showing was made that Claimant had any overtime work available as an inventory personnel, in fact, Claimant testified that he was not doing much in that position. (Tr.29). Accordingly, I find that even though Claimant was employed at the same hourly wage, he had a loss of earning capacity because the amount of overtime hours he usually worked to reach a stipulated average weekly wage of $525.00 per week (the equivalent of $13.125 per hour based on a forty hour week), was not available to him as an inventory personnel.

Claimant did not reach maximum medical improvement, and his knee disability did not become permanent, until May 14, 1996. Accordingly, Claimant is entitled to a period of temporary partial disability from March 7, 1995 to May 14, 1996, with a pre-injury wage injury capacity stipulated at $525.00 per week and a post-injury wage earning capacity of $450.00 per week, or temporary partial disability benefits of $50.00 per week, (525.00 - 450.00 = 75.00. 75.00 x 2/3 = 50.00). 33 U.S.C. § 908(e) (2002), payable beginning on March 7, 1995.

On May 15, 1995, Dr. McLachlan determined that Claimant had reached maximum medical improvement in regards to his July 27, 1994 hand injury, and had a fifty percent impairment to his index, or first finger. Under 33 U.S.C. § 908(c)(7)&(19), Claimant is entitled to forty-six weeks of compensation for a complete loss of his first finger, or twenty-three weeks of a fifty percent loss,

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capacity following his two workplace accidents and subsequent impairments. Specifically, I find that Claimant was able to perform the job at Tulane Medical University Center, as a watch person, which was available on July 3, 1996, as it fit within Claimant work restrictions set by Dr. Kinnett on February 22, 1995, within Dr. Markowitz's restrictions set between July 27, 1998, and December 18, 1998, and within Dr. Kinnett's restrictions set on July 19, 2002.

which entitles Claimant to a scheduled award of $8,050.00, (525.00 x 2/3 = 350.00. 350.00 x 46 x 50% = 8,050.00), payable beginning on May 15, 1995.

On May 14, 1996, Claimant reached maximum medical improvement in regards to his knee injury. The only evidence in the record concerning a permanent impairment rating to Claimant's left knee is provided by Dr. Habig, who assigned a fifteen to twenty percent impairment on November 29, 1995. (EX 14, p. 2). Dr. Habig stated that part of Claimant's knee impairment originated from pre-existing arthritis, which he opined was aggravated by his workplace injury. Yet, Dr. Habig felt compelled to reduce Claimant's permanent impairment rating because some of his problems were pre-existing. Because an aggravation of a pre-existing injury is compensable under the Act, *see Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998), and lacking any other evidence in the record concerning a permanent impairment rating to Claimant's knee, I find that Claimant suffers from a twenty percent permanent partial impairment, and is entitled to 57.6 weeks of compensation under 33 U.S.C. § 908(c)(2)& (19), for a total of $20,160.00. (525.00 x 2/3 = 350.00. 350.00 x 288 x 20% = $20,160.00). Both of Claimant's scheduled injuries run consecutively. 33 U.S.C. § 908(c)(22) (2002). After reaching maximum medical improvement on May 14, 1996, Claimant is not entitled to any continuing permanent partial disability after Employer demonstrated suitable alternative employment. *See Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 101 S. Ct. 509, 66 L.Ed.2d 446 (1980) (limiting an injured worker who suffers from a permanent partial scheduled injury under the Act to the amount set forth in the schedule and disallowing the injured worker a larger award under Section 8(c)(21) of the Act); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996) (finding that after a claimant establishes a *prima facie* case of total disability, that disability becomes partial on the earliest date on which the employer establishes suitable alternative employment).

E. Conclusion

Claimant failed to show that he suffered any harm to his back and thus failed to establish a *prima facie* case of compensation for back related injuries. Claimant also failed to establish that conditions exited at work that could have caused his macroglobulinemia and his subsequent hand and toe amputations related to that condition. Likewise, Claimant failed to resent a *prima facie* case that his vein and anterior ulcers that restricted blood flow to his toes could have been related to a condition at work. Although Claimant presented a *prima facie* case that his shoulder injury was related to a workplace accident, Employer rebutted this presumption by substantial evidence and based on the record as a whole, Claimant failed to carry his burden of persuasion based on all the evidence. Employer did not contest the fact that Claimant had a knee and hand injury, and Claimant's intervening thrombophlebitis was directly related to his knee surgery. In regards to his July 1, 1993 knee injury, Claimant was able to return to light duty work from July 2, 1993 to September 27, 1994, when he underwent knee surgery, and he remained temporarily totally disabled until February 22, 1995, at which time he was able to return to light duty work. Regarding his July 26, 1994 hand injury, Claimant was temporarily totally disabled until August 9, 1994, when he was able to return

to sedentary work, and on September 9, 1994, Claimant was able to return to light duty work, followed by a recommendation of light to medium work on October 4, 1994, and finally full duty on January 9, 1995. Claimant reached maximum medical improvement in regards to his hand injury on May 15, 1995, and reached maximum medical improvement in regards to his hand injury on May 14, 1996. Employer offered Claimant a suitable job within its facility on March 6, 1995, and Claimant was terminated for reasons unrelated to his disability. Because Claimant was able to continue working in his same job after his July 1, 1993 accident, he is not entitled to disability payments until July 28, 1994, when he began to miss work because of his injuries. Therefore, Claimant is entitled to temporary total disability benefits from July 28, 1994, to March 6, 1995, temporary partial disability benefits from March 7, 1995 to May 14, 1996, and a scheduled award thereafter based on fifty percent impairment to his finger and a twenty percent impairment to his knee.

F. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

G. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from July 28, 1994 to March 6, 1995 based on a average weekly wage of $525.00 per week with a corresponding compensation rate of $350.00 per week.

2. Employer shall pay to Claimant temporary partial disability compensation pursuant to Section 908(c)(21) of the Act based on two-thirds of the difference between Claimant's pre-injury wage earning capacity of $525.00 per week, and his post-injury earning capacity of $450.00 per week, for a temporary partial disability award of $50.00 per week, ($525.00 - $450.00 = $75.00. $75.00(2/3) = $50.00), from March 7, 1995 to May 14, 1996.

3. Employer shall pay to Claimant a scheduled injury based on a fifty percent loss to his finger, pursuant to Section 908(c)(7) & (19), representing twenty-three weeks of compensation payments ($8,050.00), which was payable beginning on May 15, 1995.

4. Employer shall pay to Claimant a scheduled injury based on a twenty percent impairment to his knee pursuant to Section 908(c)(2) & (19), representing 57.6 weeks of compensation payments ($20,160.00), which was payable beginning on May 14, 1996.

5. Claimant's scheduled awards run consecutively, but to the extent that Claimant's scheduled award overlaps with payment of his temporary partial disability, Claimant's award runs concurrently to the extent that Claimant is never entitled to more than an award for permanent total disability.

6. Employer shall be entitled to a credit for all compensation paid to Claimant.

7. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

8. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

9. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge